IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-cv-329-GKF(SAJ)**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

SUPPLEMENTAL AUTHORITY OF STATE OF OKLAHOMA ON RULE 34 REQUIREMENTS TO PRODUCE DOCUMENTS AS KEPT IN THE USUAL COURSE OF BUSINESS

COMES NOW Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA (the "State"), and submits the State's supplemental authority on the requirements pertaining to a production of documents as they are kept in the usual course of business pursuant to Rule 34.

Introduction

At the argument on the Cargill Defendants' Motion to Compel (Dkt. No. 1054) on April 27, 2007, counsel for the Cargill Defendants suggested that the so-called "Tyson rule", ordered by this Court in its Order reconsidering the motion to compel of the Tyson Defendants (Dkt. No. 1118), should also apply to a Rule 34 document production. That is the State, when responding to a Rule 34 document request, should organize and label its response as if it were producing documents pursuant to Rule 33(d) in accordance with the Court's Order on the motion to compel.

(Dkt # 1118). In the present context, the rule should be renamed the "Cargill rule," based upon its author and upon the fact that the Tyson Defendants have not embraced it in any context, let alone in the context of a Rule 34 document production. In response to the suggestion of the Cargill Defendants, the State sought, and the Court granted, leave to submit supplemental authorities.

A. The text of Rules 33(d) and 34(b) set forth different requirements on their face.

Rule 33(d) and Rule 34(b) address distinct needs, and consequently impose distinct requirements. Rule 33(d) allows, in some circumstances, production of business records to constitute the answer to an interrogatory and that:

> . . . it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory such records and to make copies, compilations, abstracts, or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

In order to constitute an answer to a specific interrogatory, the responding party has a duty to indicate, with some degree of specificity, from what documents the answer can be "derived or ascertained." The Court's Order on Reconsideration requires, in the absence of Bates numbering, identification to "isolate responsive documents within each box by the insertion of clips, dividers, durable index tabs or other similar method, which allows the interrogatory to which the documents respond to be clearly identified." Dkt. 1118 at p. 2.

By its terms, Rule 34(b) gives the responding party an option in the manner of production and does not require this degree of specificity, unless the producing party elects. Rule 34(b)(1), in contrast, merely requires:

> a party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request;

The second option, to organize and label documents to correspond with the categories in the request, roughly equates to the proposed requirements of the "Cargill rule." However, the "Cargill rule" flies in the face of the text of Rule 34 and would deprive the State of its option found in the Rule without justification.

B. Rule 34(b) does not require the responding party to make specifications for all document productions.

As one court cogently distinguished between the requirements of the two Rules:

> Unlike Rule 33(d), which governs Interrogatories, Rule 34(b) does not require the responding party to make specifications for all document productions. The plain phrasing of Rule 34(b) reveals that the producing party has the option of presenting information in one of two ways. If the producing party produces documents in the order in which they were kept in the usual course of business, the Rule imposes no duty to organize and label the documents. The duty to organize and label only attaches when the responding party cannot or does not produce the documents as they were kept in the usual course of business.

In re G-1 Holdings, Inc., 218 F.R.D. 428, 439 (D.N.J. 2003). While a party obviously may not mix up or hide requested documents like a needle in a haystack, according to the plain language of Rule 34, a responding party has no duty to organize and label the documents if it has produced them as they are kept in the usual course of business. *Hagemeyer North America Inc. v. Gateway Data Sciences Corp*, 222 F.R.D. 594, 598 (E.D.Wis. 2004).

As another Court put it:

> In that regard, Rule 34(b) gives the producing party the option of labeling and organizing the documents or giving the discovering party access in the usual course of business. "Accordingly, in the first instance the producing party should retain the right to choose between the production formats authorized by Rule 34(b) (but not others), but the court should have the authority where necessary to direct some disclosure of the manner of organization of the producing party's files." 8A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2213…

In re Adelphia Communications Corp, 338 F.R.D. 546, 553 (Bankr. S.D.N.Y. 2005).

Rule 34 simply does not require a party to identify to which requests the produced documents are responsive, if the party produces them as they are kept in the usual course of business. *Washington v. Thurgood Marshall Academy*, 232 F.R.D. 6, 10 (D.D.C. 2005). Furthermore, when the requests are broad and duplicative, as they are in the present case, it would be "difficult and not very useful for defendant to identify to which requests each document was responsive." *Id.*

The U.S. Court of Claims rejected an argument like the "Cargill rule" when applying its own rules, similar to Rules 33(d) and 34(b). In that case, the argument was posed:

> Arguing that the obligation to organize and label the produced documents rests with the producing party, defendant contends that RCFC 33(d) informs the proper interpretation of RCFC 34(b) to promote "[c]onsistency in the overall operation of discovery rules relating to documents." *Id.* at 5. Rule 33(d) affords a party responding to interrogatories the option of specifying the business records from which the answers may be derived if the burden in ascertaining the answers from the business records is "substantially the same" for both parties.

Renda Marine, Inc. v. U.S., 58 Fed. Cl. 57, 63 (U.S.Cl. 2003). In responding to that argument, the Court stated:

> It appears that the pivotal consideration in deciding discovery challenges under Rule 34(b), like defendant's in this case, where a large number of documents have been produced based on an "as they are kept in the usual course of business" election is whether the filing system for the produced documents "is so disorganized that it is unreasonable for the [party to whom the documents have been produced] to make [its] own review."

Id. at 64. Finding that the 38,000 pages of documents produced was not so disorganized that it could not be reviewed, the Court found that the mere size of the production was not sufficient to justify relief by the Court, and that the production as kept in the usual course of business was sufficient. *Id.* A party is not required to label and categorize responsive documents under Rule 34; as long as a party produces the documents "as they are kept in the usual course of business,"

he is in compliance with the discovery rules. *Doe v. District of Columbia*, 231 F.R.D. 27, 35-6 (D.D.C. 2005).

In the present case, the Cargill Defendants have not demonstrated that the State's filing system is so disorganized they cannot review the State's documents (because it is not), nor have they demonstrated they have not been able to locate documents from the State's files upon review. Finally, they have not rebutted the sworn affidavits of agency document custodians that the documents have been produced as kept in the usual course of business, and have indeed brought before the Court indices showing the documents were produced from various divisions and offices within the responding agencies.

C. The State has sufficiently indexed its documents produced as kept in the usual course of business.

The plain language of Rule 34 makes clear that "a responding party has no duty to organize and label the documents if it has produced them as they are kept in the usual course of business." *U.S. Commodities Futures Trading Commission v. American Derivatives Corp.*, 2007 WL 1020838, * 4 (N.D.Ga. 2007). However, particularly in a large production, a party producing documents as they are kept in the usual course of business may be required to provide a key or index to assist the responding party in locating the responsive documents. *Id.* at *5. As indicated in the State's response brief, and at oral argument, the State voluntarily prepared extensive indices of the responsive documents it has produced as a courtesy to counsel. Any occasional error in the indices does not detract from the fact that the State has produced its records as kept in the usual course of business and has more than adequately indexed them for the benefit of the Defendants

The complaint voiced by the Cargill Defendants at the hearing on April 27, 2006 to the effect that the number of hours necessary to review the State's production "don't exist," applies

equally to the number of hours necessary to review all of the uncategorized document production of the Cargill Defendants or to restart the State's—or the Cargill Defendants'—document production under the "Cargill rule," or anything like it. As a very practical matter, the State cannot substantially improve upon the indices it has already produced, but the Cargill Defendants, and most other Defendants as well, have a long way to go to come up to the standard the State has achieved, or of the proposed "Cargill Rule."[1]

The following chart shows how many requests for production have been served on the State and demonstrates the impossibility of categorizing all of the State's responsive documents to request for production by the "Cargill Rule".

	Tyson	Cargill	Simmons	Peterson	Georges	Cal-Maine	Willowbrook	Total Discovery propounded on the State
Multi-part Interrogatories	47	35	5	25	-	9		121
Request for Production	47	61	1	223	-	7		339
Request for Admission	*	*	*	*	*	*	*	250

* 250 Requests for Admission were on behalf of all defendants

Categorizing the thousands of documents produced according to the 339 requests for production submitted by the Defendants, given their number, breadth, and degree of overlap would be impossible.[2]

---

[1] If the State is required to begin its document production again and somehow more precisely categorize its documents, whether by the "Cargill rule" or by some other standard, under the "goose and gander" principle, Cargill and the other defendants must be required to do so as well.

[2] For example, the following three Requests for Production would require designation of separate, but overlapping sets of responsive documents:

Peterson Request to ODEQ

CONCLUSION

Wherefore premises considered, the State prays that the Court deny the Cargill Defendants' Motion to force the State to label and index its responsive documents to Rule 34 requests in accordance with the "Cargill Rule."

Respectfully Submitted,

W.A. Drew Edmondson OBA # 2628
Attorney General
Kelly H. Burch OBA #17067
J. Trevor Hammons OBA #20234
Assistant Attorneys General
State of Oklahoma
313 N.E. 21st St.
Oklahoma City, OK 73105
(405) 521-3921

/s/ M. David Riggs
M. David Riggs OBA #7583
Joseph P. Lennart OBA #5371
Richard T. Garren OBA #3253
Douglas A. Wilson OBA #13128
Sharon K. Weaver OBA #19010
Robert A. Nance OBA #6581
D. Sharon Gentry OBA #15641
Riggs, Abney, Neal, Turpen,
Orbison & Lewis
502 West Sixth Street
Tulsa, OK 74119
(918) 587-3161

REQUEST NO. 37: Produce all documents and data related to any reports, studies issued or projects undertaken or contemplated, whether or not completed, since March 31, 2001 related to Lake Tenkiller TMDL modeling activities, including all documents and date created prior to, during or after the completion of any report, study or project until the present.

CARGILL TURKEY REQUEST FOR PRODUCTION NO. 38: Produce all documents related to Your contention that the actions or omissions of the Defendants have resulted in eutrophication within the Illinois River Watershed.

CARGILL TURKEY REQUEST FOR PRODUCTION NO. 44: Produce all documents related to water quality within the Illinois River Watershed.

James Randall Miller, OBA #6214
Louis Werner Bullock, OBA #1305
Miller Keffer & Bullock
222 S. Kenosha
Tulsa, Ok 74120-2421
(918) 743-4460

David P. Page, OBA #6852
Bell Legal Group
222 S. Kenosha
Tulsa, OK 74120
(918) 398-6800

Frederick C. Baker
(admitted *pro hac vice*)
Elizabeth C. Ward
(admitted *pro hac vice*)
Elizabeth Claire Xidis
(admitted *pro hac vice)*
Lee M. Heath
(admitted *pro hac vice)*
Motley Rice, LLC
28 Bridgeside Boulevard
Mount Pleasant, SC 29465
(843) 216-9280

William H. Narwold
(admitted *pro hac vice*)
Motley Rice, LLC
20 Church Street, 17 Floor th
Hartford, CT 06103
(860) 882-1676

Attorneys for the State of Oklahoma

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of May, 2007, the foregoing document was electronically transmitted to the following:

Jo Nan Allen - jonanallen@yahoo.com bacaviola@yahoo.com
Frederick C Baker- fbaker@motleyrice.com; mcarr@motleyrice.com; fhmorgan@motleyrice.com
Tim Keith Baker - tbakerlaw@sbcglobal.net
Sherry P Bartley - sbartley@mwsgw.com jdavis@mwsgw.com
Michael R. Bond - michael.bond@kutakrock.com amy.smith@kutakrock.com

Douglas L Boyd - dboyd31244@aol.com
Vicki Bronson - vbronson@cwlaw.com lphillips@cwlaw.com
Paula M Buchwald - pbuchwald@ryanwhaley.com
Louis Werner Bullock - lbullock@mkblaw.net, nhodge@mkblaw.net, bdejong@mkblaw.net
A Michelle Campney - campneym@wwhwlaw.com steelmana@wwhwlaw.com
Michael Lee Carr - hm@holdenoklahoma.com MikeCarr@HoldenOklahoma.com
Bobby Jay Coffman - bcoffman@loganlowry.com
Lloyd E Cole, Jr - colelaw@alltel.net; gloriaeubanks@alltel.net; amy_colelaw@alltel.net
Angela Diane Cotner - AngelaCotnerEsq@yahoo.com
Reuben Davis - rdavis@boonesmith.com
John Brian DesBarres - mrjbdb@msn.com JohnD@wcalaw.com
W A Drew Edmondson - fc_docket@oag.state.ok.us; drew_edmondson@oag.state.ok.us; suzy_thrash@oag.state.ok.us.
Delmar R Ehrich - dehrich@faegre.com; etriplett@faegre.com; qsperrazza@faegre.com
John R Elrod - jelrod@cwlaw.com vmorgan@cwlaw.com
William Bernard Federman - wfederman@aol.com; aw@federmanlaw.com; ngb@federmanlaw.com
Bruce Wayne Freeman - bfreeman@cwlaw.com lclark@cwlaw.com
Ronnie Jack Freeman - jfreeman@grahamfreeman.com
Richard T Garren - rgarren@riggsabney.com dellis@riggsabney.com
Dorothy Sharon Gentry - sgentry@riggsabney.com jzielinski@riggsabney.com
Robert W George - robert.george@kutakrock.com; sue.arens@kutakrock.com; amy.smith@kutakrock.com
Tony Michael Graham - tgraham@grahamfreeman.com
James Martin Graves - jgraves@bassettlawfirm.com
Michael D Graves - mgraves@hallestill.com; jspring@hallestill.com; smurphy@hallestill.com
Jennifer Stockton Griffin - jgriffin@lathropgage.com
Carrie Griffith - griffithlawoffice@yahoo.com
John Trevor Hammons thammons@oag.state.ok.us; Trevor_Hammons@oag.state.ok.us; Jean_Burnett@oag.state.ok.us
Lee M Heath - lheath@motleyrice.com
Michael Todd Hembree - hembreelaw1@aol.com traesmom_mdl@yahoo.com
Theresa Noble Hill - thillcourts@rhodesokla.com mnave@rhodesokla.com
Philip D Hixon - phixon@mcdaniel-lawfirm.com
Mark D Hopson - mhopson@sidley.com joraker@sidley.com
Kelly S Hunter Burch - fc.docket@oag.state.ok.us; kelly_burch@oag.state.ok.us; jean_burnett@oag.state.ok.us
Thomas Janer - SCMJ@sbcglobal.net; tjaner@cableone.net; lanaphillips@sbcglobal.net
Stephen L Jantzen - sjantzen@ryanwhaley.com; mantene@ryanwhaley.com; loelke@ryanwhaley.com
Mackenzie Lea Hamilton Jessie - maci.tbakerlaw@sbcglobal.net; tbakerlaw@sbcglobal.net; macijessie@yahoo.com
Bruce Jones - bjones@faegre.com; dybarra@faegre.com; jintermill@faegre.com; cdolan@faegre.com
Jay Thomas Jorgensen - jjorgensen@sidley.com
Krisann C. Kleibacker Lee - kklee@faegre.com mlokken@faegre.com

Derek Stewart Allan Lawrence - hm@holdenoklahoma.com; DerekLawrence@HoldenOklahoma.com
Raymond Thomas Lay - rtl@kiralaw.com dianna@kiralaw.com
Nicole Marie Longwell - nlongwell@mcdaniel-lawfirm.com lvictor@mcdaniel-lawfirm.com
Dara D Mann - dmann@faegre.com kolmscheid@faegre.com
Linda C Martin - lmartin@dsda.com mschooling@dsda.com
Archer Scott McDaniel - smcdaniel@mcdaniel-lawfirm.com jwaller@mcdaniel-lawfirm.com
Robert Park Medearis, Jr - medearislawfirm@sbcglobal.net
James Randall Miller - rmiller@mkblaw.net; smilata@mkblaw.net; clagrone@mkblaw.net
Charles Livingston Moulton - Charles.Moulton@arkansasag.gov; Kendra.Jones@arkansasag.gov
Robert Allen Nance rnance@riggsabney.com jzielinski@riggsabney.com
William H Narwold - bnarwold@motleyrice.com
John Stephen Neas - steve_neas@yahoo.com
George W Owens - gwo@owenslawfirmpc.com ka@owenslawfirmpc.com
David Phillip Page - dpage@edbelllaw.com smilata@edbelllaw.com
Michael Andrew Pollard - mpollard@boonesmith.com kmiller@boonesmith.com
Marcus N Ratcliff - mratcliff@lswsl.com sshanks@lswsl.com
Robert Paul Redemann - rredemann@pmrlaw.net scouch@pmrlaw.net
Melvin David Riggs - driggs@riggsabney.com jsummerlin@riggsabney.com
Randall Eugene Rose - rer@owenslawfirmpc.com ka@owenslawfirmpc.com
Patrick Michael Ryan - pryan@ryanwhaley.com; jmickle@ryanwhaley.com; amcpherson@ryanwhaley.com
Laura E Samuelson - lsamuelson@lswsl.com lsamuelson@gmail.com
Robert E Sanders - rsanders@youngwilliams.com
David Charles Senger - dsenger@pmrlaw.net; scouch@pmrlaw.net; ntorres@pmrlaw.net
Jennifer Faith Sherrill - jfs@federmanlaw.com; law@federmanlaw.com; ngb@federmanlaw.com
Michelle B Skeens - hm@holdenokla.com mskeens@holdenokla.com
William Francis Smith - bsmith@grahamfreeman.com
Monte W Strout - strout@xtremeinet.net
Erin Walker Thompson - Erin.Thompson@kutakrock.com
Colin Hampton Tucker - chtucker@rhodesokla.com scottom@rhodesokla.com
John H Tucker - jtuckercourts@rhodesokla.com mbryce@rhodesokla.com
Kenneth Edward Wagner - kwagner@lswsl.com sshanks@lswsl.com
Elizabeth C Ward - lward@motleyrice.com
Sharon K Weaver - sweaver@riggsabney.com lpearson@riggsabney.com
Timothy K Webster - twebster@sidley.com jwedeking@sidley.com
Terry Wayen West - terry@thewestlawfirm.com
Dale Kenyon Williams, Jr - kwilliams@hallestill.com; jspring@hallestill.com; smurphy@hallestill.com
Edwin Stephen Williams - steve.williams@youngwilliams.com
Douglas Allen Wilson - Doug_Wilson@riggsabney.com; jsummerlin@riggsabney.com
J Ron Wright - ron@wsfw-ok.com susan@wsfw-ok.com
Elizabeth Claire Xidis - cxidis@motleyrice.com
Lawrence W Zeringue - lzeringue@pmrlaw.net **scouch@pmrlaw.net**

I further hereby certify that on this 2nd day of May, 2007, I served the forgoing document by U.S. Postal Service on the following:

Justin Allen
Jim DePriest
Dustin McDaniel
Office of the Attorney General (Little Rock)
323 Center Street, Suite 200
Little Rock, AR 72201-2610

Jim Bagby
RR 2, Box 1711
Westville, OK 74965

Gordon and Susann Clinton
23605 S. Goodnight Lane
Welling, OK 74471

Eugene Dill
P.O. Box 46
Cookson, OK 74424

Marjorie Garman
5116 Highway 10
Tahlequah, OK 74464

Thomas Green
Sidley, Austin, Brown & Wood
1501 K Street NW
Washington, DC 20005

G Craig Heffington
20144 W. Sixshooter Road
Cookson, OK 74427

William and Cherrie House
P.O. Box 1097
Stilwell, OK 74960

John E. and Virginia W. Adair Family Trust
Rt 2, Box 1160
Stilwell, OK 74960

James and Dorothy Lamb
Route 1, Box 253
Gore, OK 74435

Jerry M. Maddux
Selby, Connor, Maddux, Janer
P.O. Box Z
Bartlesville, OK 74005-5025

Doris Mares
P.O. Box 46
Cookson, OK 74424

Richard and Donna Parker
34996 S 502 Road
Park Hill, OK 74451

C. Miles Tolbert
Secretary of Environment
State of Oklahoma
3800 North Classen
Oklahoma City, OK 73118

Robin L. Wofford
Rt. 2, Box 370
Watts, OK 74964

/s/ M. David Riggs
M. David Riggs